Supreme Court, U.S.
FILED

011102 JAN 22 2002

OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

APPOLO FUELS, INC.,

Petitioner,

v.

BRUCE BABBITT, SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR; OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, U.S. DEPARTMENT OF THE INTERIOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JAMES R. GOLDEN
KEITH A. NAGLE
DENHAM, GOLDEN AND NAGLE
P.O. Box 398
Middlesboro, KY 40965
(606) 248-2765

GARY W. NAPIER
Counsel of Record
NAPIER & ASSOCIATES P.S.C.
Suite B, 819 N. Main Street
P.O. Drawer 5087
London, KY 40745-5087
(606) 864-2263

Attorneys for Petitioner

171554

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The Surface Mining Control and Reclamation Act of 1977 established a comprehensive set of standards for reclamation of surface coal mines. Among these is the requirement that the operator of a contour surface mine in a mountainous area, after initially removing the earth (overburden) to recover coal, backfill this material against the highwall, and grade it to achieve the "approximate original contour . . . with all highwalls eliminated". After this standard is achieved by the operator, it is not uncommon for a small amount of the highwall to become re-exposed due to the settlement, or consolidation, of the earthen fill material. The legislative history of the Act reveals that Congress intentionally did not impose upon operators any of the standard methods which could be employed to control or reduce such settlement; nor do the regulatory agencies require these in the mine permitting process or during reclamation operations (OSM considered, then abandoned the idea in 1990). Both OSM and the state regulatory agencies charged with implementing the Act have tolerated this minor highwall re-exposure in varying degrees. Yet the "official" position of OSM is that no post-reclamation settlement is ever allowed, which position is supported by several administrative decisions of the Interior Board of Land Appeals. It is these administrative decisions which were upheld by the Court of Appeals, and which Petitioner seeks to have examined and overturned.

Moreover, the regulators have acted on this issue pursuant to a series of unpublished, internally promulgated "enforcement policies" with the result that the same condition may or may not constitute a violation, depending upon the location of the mine, the time of inspection and the

enforcement policy then in effect. In the present case, a state proceeding initiated in 1990 ultimately determined that no violation existed on Appolo's permit, but the instant action by OSM reached the opposite result.

The question presented is whether the Surface Mining Control and Reclamation Act of 1977 contemplates regrading to eliminate small highwalls created from fill settlement, after reclamation and re-vegetation is once successfully completed.

Also at issue is whether OSM's arbitrary and selective enforcement of the highwall elimination standard violated Appolo's right of Due Process as guaranteed under the United States Constitution.

The third issue is whether the administrative decision reached in the state proceeding should have precluded further action by OSM.

STATEMENT PURSUANT TO RULE 29.6

The Petitioner, Appolo Fuels, Inc., states that it has no corporate parent, and that no publicly held company owns 10% or more of Appolo Fuels, Inc., stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	iii
Table of Contents	iv
Table of Cited Authorities	vi
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Writ	14
I. The Court Of Appeals Ruling Perpetuates An Erroneous Interpretation Of SmCRA Which Adversely Impacts A Major Portion Of The Nation's Coal Industry.	14
II. The Inconsistent And Irrational "Enforcement Policies" Applied By OSM Have Created A Breach Of Due Process Warranting Intervention By This Court.	17

Contents

Page

III. Due Process Demands That OSM Respect Results Of Litigation In An Approved State Administrative Review Process. 19

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Cases:

In Re: Permanent Surface Mining Regulatory Litigation, 653 F.2d 514 (D.C. Cir. 1981) 19

Motor Vehicle Manufacturers Association v. State Farm, 463 U.S. 29 (1983) 18

National Wildlife Federation v. Mary Helen Miller, Secretary Natural Resources Environmental Protection Cabinet, et al., Civil Action No. 86-99 9

River Processing, Inc., v. OSM, 76 IBLA 129 (1983) 6, 8, 14, 15, 16

Statutes:

28 U.S.C. 1254(1) 1

30 U.S.C. § 1201, *et seq.* 1, 2

30 U.S.C. § 1258 7

30 U.S.C. § 1260 7

30 U.S.C. § 1265(b)(3) 3

30 U.S.C § 1265(d)(2) 3

30 U.S.C. § 1271 7

30 U.S.C. § 1276(a)(1) 18

Cited Authorities

Page

Other Authorities:

53 FR 26728 (July 14, 1988) 19

53 FR 26731 (July 14, 1988) 19

55 FR 14319 (April 17, 1990) 7, 16

55 FR 14319 14321 16

56 FR 17480 (April 22, 1991) 7

H.R. Rep. 95-218 4

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Sixth Circuit Dated, Decided And Filed October 24, 2001 ..... 1a

Appendix B — Memorandum Opinion, Order And Judgment Of The United States District Court For The Eastern District Of Kentucky, London Division Dated And Filed February 24, 2000 ..... 14a

Appendix C — Opinion Of The United States Department Of The Interior Dated And Decided May 28, 1998 ..... 33a

Appendix D — Relevant Statute And Legislative Material 43a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The District Court's opinion (per Johnson, Magistrate Judge) granting Respondents' Summary Judgment motion is unpublished. The Court of Appeals opinion (per Daughtrey, J., joined by Gilman and Weber, J.J.) affirming (Pet. App. 1a) is published at 270 Fed. 3d 333.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion on October 24, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Surface Mine Control and Reclamation Act of 1977, 30 U.S.C. § 1201, *et seq.*, relevant to this petition are reprinted in the Appendix at 43a.

STATEMENT OF THE CASE

Appolo Fuels, Inc., ("Appolo") is a medium-sized coal company producing approximately two million tons of coal per year from operations which straddle the Kentucky-Tennessee border near Cumberland Gap, Tennessee, and Middlesboro, Kentucky. The Office of Surface Mine Reclamation and Enforcement ("OSM") of the United States Department of Interior is the agency created by Congress to regulate surface coal mining pursuant to the provisions of

the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, *et seq.* ("SMCRA" or the "Act"). OSM has direct enforcement authority for surface mining operations within the state of Tennessee, while in the Commonwealth of Kentucky, primary jurisdiction has been delegated to the State Department for Surface Mine Reclamation and Enforcement ("DSMRE"), subject to limited statutory oversight jurisdiction retained by OSM. Appolo has operated on more than forty surface mining permits issued by OSM and DSMRE, and has received recognition from both agencies for outstanding surface mine reclamation.

1. A correct interpretation of SMCRA requires understanding of the conventional strip mining practices as they existed in Appalachia prior to 1977, and the environmental problems thereby caused. Strip mining in the mountains typically involves a contour cut along the side of a mountain whereby the layers of rock and dirt above the coal seam are blasted and removed, leaving a shear rock wall, similar to the rock cuts commonly seen along interstate highways. In "pre-law" mining, the material which was removed ("overburden" or "spoil") was pushed over the side of the mountain below the level of the coal seam and then graded outward to create more working area. A relatively flat "bench" was thus created, consisting in part of solid material directly underlying the coal and the loose spoil material which had been shoved over the bank and graded to extend the bench outward. This latter area was called a "fill-bench". This practice of dumping loose overburden over the side of the mountain below the mine was the source of most, if not all, of the environmental problems associated with pre-law strip mining. The fill-bench was typically not stable, and was subject to slides and erosion, which resulted

in significant sedimentation of streams as well as other problems. None of these problems were associated directly with the existence of the exposed highwall which is merely a rock face not unlike exposed rock outcrop found naturally throughout Appalachian Mountains or those highwalls which are a permanent feature of highway construction.

Perhaps the central and most controversial provision of SMCRA was the requirement of backfilling spoil material against the highwall to the "approximate original contour" ("AOC"). The central debate in Congress was whether backfilling and grading spoil to the top of the highwall was practical or feasible. Opponents argued for exceptions to the complete highwall elimination requirement where it was shown to be infeasible or a lesser requirement of partially covering the wall to within thirty feet or so, in order that trees would cover it in a few years. In the end, Congress opted for "complete" highwall elimination, utilizing all available spoil for that purpose, with no spoil dumped on the out-slope below the bench. Any excess spoil material must be placed in engineered fills for permanent storage ("hollow-fills"). The Act explicitly requires that the backfill have long term stability, 30 U.S.C § 1265(d)(2). However, the question of normal settlement or consolidation of the fill material (which normally increases stability) was not addressed by any performance standard included in the Act. Compaction of fill material (which would be the primary means of reducing future settlement) is not required except "where advisable to insure stability or to prevent leaching of toxic materials", 30 U.S.C. § 1265(b)(3), Pet App. 43a[1]. In contrast,

1. Engineering studies performed after enactment of SMCRA, and accepted by both OSM and DSMRE, demonstrate that compaction is not necessary to achieve stability in mine spoil backfill scenarios. (Cont'd)

precise and strict performance standards were included to address settlement of earthen materials in other components of the mining and reclamation process, to wit: construction of earthen dam sediment structures (ponds), permanent spoil storage facilities (hollow-fills) and coal refuse disposal sites. Moreover, H.R. Rep. 95-218 (Pet. App. 43a) makes explicit reference to the necessity of "controlled placement and compaction of spoil" to reduce or control anticipated settling where the post-mining land use will include residential, commercial or other building development. Thus, it is apparent that the Congress intentionally did not require that the operator take any measure to address the future settlement or consolidation of the material backfilled against highwalls, even though this necessarily would re-expose some portion of the highwall over time.

In the instant case, DSMRE approved Appolo's mine and reclamation plan for a very large, multi-seam, multi-contour surface mining operation in Bell County, Kentucky, which included two separate, stair-stepped highwalls each in the range of 110 to 140 feet in height. Although the approved permit included a detailed backfilling and grading plan for achievement of AOC, there were no measures included to address future settlement of the fill. Appolo completed the mining and reclamation between 1985 and 1988. During this period, Appolo blasted, removed, backfilled and re-graded approximately 10 million cubic yards of earthen material, all in accord with the approved permit plan. The method of construction was inspected monthly by DSMRE and

---

(Cont'd)

Accordingly, compaction *per se* is not normally employed in operations conducted under the Act. As OSM acknowledged in the 1990 rule making, backfilling can be achieved in a single lift (i.e., back-dumped), if stability is certified.

periodically by OSM. No violations were ever written, nor was any other enforcement action taken, with regard to the method of construction the backfill. Appolo did not depart from the SMCRA performance standards or its permit in any way, in terms of backfilling and grading. On March 1, 1989, DSMRE certified that backfilling, grading and initial vegetation of the site had been successfully accomplished, with all highwalls completely eliminated, releasing sixty percent of Appolo's performance bonds on the site.

By 1990, the fill had settled more or less uniformly along the eleven thousand linear feet of contour, re-exposing highwall up to eight feet. DSMRE issued a violation which Appolo contested, ultimately resulting in a final order allowing the minor highwalls to remain. The Hearing Officer made the following analysis of the issue:

> The parties do not dispute the construction to be given the cited regulations except as applied to highwalls created by settling. In reviewing (citation omitted), it is clear that AOC must be established during reclamation. However, the regulations do not refer to "maintaining" AOC after it is established. Furthermore, no regulation addresses compaction of backfilled material to prevent settling after AOC is initially established. From a fairness perceptive, it would seem logical that the regulation address commonly occurring settling if it was intended that AOC be established and "maintained" until a final release is obtained.

In 1994, OSM issued its own violation, citing the same conditions. On October 29, 1997, Administrative Law Judge David Torbett upheld the violation, and Appolo appealed to

Office of Hearings and Appeals ("OHA") of the Interior Board of Appeals of the Department of Interior. The OHA upheld Judge Torbett by decision of May 28, 1998, whereupon Appolo instituted an appeal in the United States District Court for the Eastern District of Kentucky. That Court affirmed on February 24, 2000.[2]

Neither the District Court, nor the Sixth Circuit gave any real analysis to the question of reemerged highwalls in the context of the Legislative history of SMCRA and the admissions of OSM contained in the record.

The fundamental error of the Court of Appeals as well as the Interior Board of Land Appeals in *River Processing, Inc., v. OSM*, 76 IBLA 129 (1983) is their focus on the possible *means* or *methods* by which the operator can avoid the settled highwall situation. It has been suggested that the backfill could be "overfilled" so that the ultimate settled height of the fill would equal the top of the highwall. More conventional means include the use of compaction, controlled placement, control of particle size, moisture density and the like. Unquestionably, there are methods which can be employed to control or reduce future settlement in earthen fills. Nevertheless, as OSM engineer House acknowledged,

2. The decisions of the District Court and OHA are replete with references to potential landslides, slumps, scarps, fissures, and in general the alleged instability of the backfill. These references relate to an allegation of instability in the fill which pertained only to an isolated area of the permit. In an effort to bring focus upon the issue of highwalls created by settled fill material, Appolo elected not to appeal from that portion of the judgments below which dealt with the instability issue, and accordingly the portent of environmental disaster which these references were intended to suggest has not been brought before this Court.

these are largely impracticable in the surface mining context, which no doubt explains the agency's termination of its rule-making effort on the topic, 56 FR 17480 (April 22, 1991). The question is not "is it possible?" to prevent settled highwalls or "by what method?"; rather, the issue is one of fairness: If the operator is expected to employ *any* means to address the issue, should he not be told *before* undertaking the mining and reclamation rather than *after*? SMCRA simply does not ask the operator to address the issue. There is no provision requiring "permanent" highwall elimination, and the means of accomplishing such a standard were intentionally not included in the Act.

Surface mining reclamation under the Act is not analogous to a "turn-key" contract where the operator is free to conduct the operation in the manner of his own choosing, so long as the end result meets certain criteria. On the contrary, SMCRA requires that the operator submit a highly detailed plan which must demonstrate that, if followed, the end result will achieve every performance standard of the Act, 30 U.S.C. § 1258. The plan is subjected to intense technical review in its every aspect prior to approval. Issuance of the permit constitutes a finding by the regulatory agency that, if followed, the requirements of the Act will be achieved, 30 U.S.C. § 1260. Once underway, mining and reclamation operations must follow the plan and are subjected to frequent, comprehensive inspection. Deviation from the permit will result in violations, 30 U.S.C. § 1271. As Appolo engineer Eugene S. Boston stated "they (OSM) control our lives".

OSM has officially acknowledged, in the proposed rule-making initiated in 1990, 55 FR 14319 (April 17, 1990), that there are no standards incorporated in the regulations or any mining permits to address the issue of settlement of fill

material. In short, while OSM is on the one hand defending *River Processing*, it has never incorporated the rule of that case into the regulatory regime. It does not require any coal operator to address the issue in its mining permit, nor does it do so during the actual mining and reclamation operations. Only after the fact, if the settlement exceeds certain irrational, arbitrarily established and unevenly-applied limits, does the agency take action.

2. The "enforcement policies" OSM applies to re-emerged highwalls have never been subjected to public comment and are not part of the official regulations issued by OSM. The policy employed here against Appolo, the Kentucky "3 foot rule" has no rational basis or reason to support it, according to all of the engineers who testified at the original hearing, including OSM engineer Terry House. This rule simply allows settlement up to three feet and no more, regardless of highwall height. Other enforcement policies laid out in the record allow a certain degree of settlement, either on a "case by case basis" or based upon a percentage of total highwall height. A percentage-based rule is at least logical in that settlement normally occurs at a rate that is relative to the height of the fill. Highwall heights can vary radically depending upon the size of the coal seam and many other factors, and therefore a fixed, across-the-board rule makes no sense. Five miles south of Appolo's mine, in Tennessee, OSM applies a more flexible policy under which the site in question would largely escape further enforcement action.

Several variations of these regulatory policies were identified and included in the record. The first was known as the "Footnote 3 Rule" and arose from settlement of litigation in U.S. District Court for the Eastern District of

Kentucky, Frankfort, styled *National Wildlife Federation v. Mary Helen Miller, Secretary Natural Resources Environmental Protection Cabinet, et al.*, Civil Action No. 86-99, wherein the DSMRE agreed to apply the following standard on interim program sites:

> For sites on the inventory where some highwall remains, but does not exceed six (6) feet or ten (10%) percent of the vertical highwall, whichever is greater, and all other performance standards are in compliance upon inspection (including the requirement that the coal seam be covered with a minium of four feet of non-acid- forming, non-toxic-forming material), no enforcement action will be taken, provided that a current stability analysis of the existing backfill demonstrates that the long-term stability of the backfill is not adversely affected. If these requirements are met, the bond for the area may be released.

President Reagan signed a continuing resolution on December 22, 1987, (P.L. 100-202), Appropriations for Fiscal Year 1988, which specified "the Secretary of Interior shall abide by and adhere to the terms of the settlement agreement in [*NWF v. Miller*] and not take any action inconsistent with the provision of Footnote 3 of the agreement with respect to *any* state or federal program" (emphasis added). Based upon this presidential directive, OSM adopted the following enforcement policy:

POLICY

It is the policy of the Office of Surface Mining Reclamation and Enforcement (OSMRE) to ensure that ten-day notices or enforcement actions are not issued on interim program mine sites *or portions of mine sites where*:

1. backfilling and grading has been completed and revegetation initiated prior to December 22, 1987;

2. any remaining highwall does not exceed the greater of six (6) feet or ten percent (10%) of the total highwall mined;

3. all other performance standards are in compliance upon inspection including the requirement that coal seam be covered with a minimum of four (4) feet of non-acid-forming and non-toxic-forming material; and,

4. *the permittee is informed of the need for* and provides a current stability analysis which demonstrates that the long term stability of the existing backfill and remaining highwall will not be adversely affected. Such stability analysis shall be certified by registered professional engineer. (Emphasis supplied)

Appolo argued that this policy should have at least applied to increments 1 through 5 of its permit which would

have eliminated most of the alleged highwall violation.[3] OSM contends that Footnote 3 applies only to Interim Program Sites, even though the wording of the policy and the presidential directive allows broader application. In 1989, OSM adopted another enforcement policy which was rescinded after only four months. It read as follows:

> 4. *Policy/Procedures.*
>
> (a) *Background.* Section 515(b)(3) of the Act and section 816.102(a)(2) of the regulations (under backfilling and grading: general requirements) require the elimination of all highwalls. Section 519(c)(1) of the Act and 800.40(c)(1) of the regulations specify that an operator may have up to 60% of his bond released upon completion of backfilling, regrading, and drainage control. Section 519(c)(3) of the Act and Section 800.40A(c)(c) of the regulations provided that a bond may be fully released only after extended liability period or revegetation has expired and all reclamation requirements have been met. *An issue arises when settlement occurs between the time of phase 1 and phase 3 bond release, and such settlement leaves some portion of highwall exposed at the termination of the period of extended liability.*
>
> (b) *Policy.* When a permittee has received a phase 1 bond release, it is on the basis that he

3. Although OSM identified one location where settlement had occurred to a height of fifteen feet, the average was less than ten feet, which would in all cases be less than ten percent of the total highwall mined.

> has complied with backfilling and grading requirements. The period of extended liability contained in Section 515(b)(20) of the Act is expressly for revegetation and attainment of the postmining land use, as is the 2 year period of extended liability in 30 CFR 715.20(f)(2) of the regulations. Even in well constructed backfills, some settlement over time should be expected and allowed. Such settlement should be planned for in the permit application and accommodated in the plan for backfilling and regrading. *However, subsequent settlement of approved, stabilized, and well revegetated fills that does expose a small portion of the highwall generally should not constitute a basis for requiring the additional disturbance associated with remedial backfilling and grading.* However, in situations where the settlement interferes with achievement of the postmining land use, or is associated with slumping or other indications of instability, requiring remedial regrading to correct those problems and eliminate any wall exposed through settlement would be appropriate. (Emphasis added).

At the time of the hearing before Judge Torbett, a then-current OSM directive was introduced which stated that "after phase I bond release, any backfill settlement will be evaluated on a case-by-case basis in accordance with existing settlement policy". None of the witnesses at the hearing could articulate, however, what the "existing settlement policy" was.

3. The Kentucky 3-foot rule was applied by OSM in this case because the site falls within the jurisdiction of the

Kentucky DSMRE. That is, OSM has approved Kentucky's program for "primacy" under the Act, allowing the state to serve as OSM's proxy in implementing the Act. The Kentucky program includes an administrative review process approved by OSM and a state counterpart to each component of the federal program. Following a full administrative hearing on the merits, a final order of the Kentucky DSMRE imposed no penalty and allowed the small highwalls to remain, based upon the rationale of the hearing officer quoted, *supra* at 8. The same facts which gave rise to the Kentucky enforcement action prompted initiation of the current case by OSM in 1994. Appolo argued that this earlier adjudication should have had preclusive effect as to any future enforcement action based upon the same conditions, citing *res judicata* and further upon the grounds that OSM's action exceeds the precisely defined contours of its oversight jurisdiction. Specifically, OSM is not to proceed unless the state's failure to act is "arbitrary, capricious, or an abuse of discretion under the state program". Moreover, a state has "good cause" for failure to act wherever its regulatory authority is "precluded from acting on the possible violation by an administrative order, where that order is based on the violation not existing . . .". The original administrative order of the DSMRE was tantamount to such a finding, and under DSMRE regulations, precluded that agency from taking any further action. However, instead of resolving Appolo's liability, the company derived no benefit whatever from the decision, as it was completely ignored by OSM, thus subjecting Appolo to the type of dual, conflicting enforcement which was not intended under the Act.

REASONS FOR GRANTING THE WRIT

The Petition should be granted in order that the Court can correct a fundamental error of interpretation on the part of OSM which affects a major portion of the nation's coal industry.

In addition, enforcement of conflicting and concededly irrational "enforcement policies" rather than properly promulgated regulations, is such an egregious violation of substantive due process as to warrant this Court's intervention.

I. THE COURT OF APPEALS RULING PERPETUATES AN ERRONEOUS INTERPRETATION OF SMCRA WHICH ADVERSELY IMPACTS A MAJOR PORTION OF THE NATION'S COAL INDUSTRY.

The Coal industry remains an important component of the nation's energy supply. Approximately fifty percent of the electricity used in the continental United States is generated from the use of coal. A large percentage of this coal is mined in the mountainous Appalachian region of Kentucky, West Virginia, Pennsylvania, Ohio and Tennessee. The rule of *River Processing* as applied in this and other cases by OSM has a significant impact on these coal operations, by imposing unnecessary and costly reclamation in instances were environmental concerns alone do not warrant any further action. The site in question is no longer even under the jurisdiction of DSMRE, having received final bond release during the pendency of this action.

The origin of the misinterpretation lies in SMCRA's requirement that the highwalls be "completely" eliminated. No doubt this language was used in order to clearly reject alternative proposals which had been forcefully debated during the years preceding enactment. Of course, those debates centered around whether the operator would ever be required to eliminate highwalls, *in the first instance*. The issue of future shrinkage of the fill material, due to consolidation, was simply not addressed. However, it is plain that (1) the Congress was aware that any earthen fill would tend to settle, and (2) it deliberately omitted any requirement that the operator address such settlement. Stability is to be achieved for the long term, however, complete highwall elimination is not.

The primary means in which one would address future settlement would be by compaction of the spoil material as it is laid down in "lifts" (layers). This reduces the air voids, thus reducing the amount of future settlement. The Act expressly does not require compaction, however, except as may be necessary to ensure stability or to prevent leaching of toxic materials. It was on this point that the board in *River Processing* stumbled, as revealed in the following quote:

> While the settling of backfill material is not mentioned in 30 CFR 715.14, there is certainly a mandate for an operator to take it into account implied in the language of that section: "in order to achieve the approximate original contour, the permittee shall . . . transport, backfill, *compact* (where advisable to ensure stability or to prevent leaching of toxic materials), and to grade all spoil materials to eliminate all highwalls". (Emphasis in original).

Contrary to the above quoted rationale supporting the *River Processing* holding, OSM has expressly acknowledged that the operator is *not* required to take into account future settling of backfill material. In its proposed rule making, on technical standards for backfilling and grading requirements, 55 FR 14319 (April 17, 1990), the agency acknowledged that Congress had not addressed the issue:

> While the disposal of excess spoil material and coal waste products are not exactly the same as backfilling against a highwall, there are similarities. . . . There are, however, great differences in the requirements Congress applied to the disposal of excess spoil and coal mine waste and the return of spoil against a highwall. Excess spoil and coal waste have placement and compaction requirements, while spoil backfilled against the highwall has no specific placement requirements, and compaction only where advisable to ensure stability and prevent leaching, *id.*, at 14320.

Indeed, the OSM was considering several requirements to address the problem of backfill settlement including specifying a certain degree of compaction as well as limiting lift thickness, acknowledging that "presently fills may be constructed in a single lift if the stability is certified", *id*, at 14321.

Thus, OSM has never followed the rule of *River Processing*, yet it is defending the decision here. The rationale of OSM and the Board seems to be that, while there are no performance standards or requirements imposed in the permitting or during the mining and reclamation, the operator

is nevertheless supposed to know that highwall elimination is a requirement, and that it must be permanently achieved. The problem with this line of thinking is that it runs contrary to the way in which SMCRA is written and enforced. If the requirement to prevent settled backfill is indeed a component of SMCRA, then it is unique in that it is the only performance standard about which OSM says nothing until all operations on the permit are complete. This cannot be the law.

A Writ of Certiorari should be granted to correct this unfair and wrong-headed approach from being applied to an important industry.

II. THE INCONSISTENT AND IRRATIONAL "ENFORCEMENT POLICIES" APPLIED BY OSM HAVE CREATED A BREACH OF DUE PROCESS WARRANTING INTERVENTION BY THIS COURT.

Not only is OSM enforcing its unwritten backfill settlement performance standard on an "after-the-fact" basis, there is no duly promulgated regulation fairly apprising the operator of what is expected of him. Rather, the agency has proceeded according to a series of policies which are the product of the agency's fundamental misinterpretation of the Act. Clearly whether a particular condition constitutes a violation depends upon the happenstance of timing and political boundaries, as illustrated by the following testimony of OSM engineer House:

> Q: Now, you indicated that Footnote 3 has expired. I don't know if you've since learned when it expired, but does that mean that whether an operator gets a violation just

> depends on when the inspector happens to come on this permit, whether it is before the expiration of Footnote 3 or after?
>
> A: The policy rescission procedures are to be used by all of the inspectors. They are to know when these policies apply and when not to apply. So in answer to your question, when someone comes on the job, they are to already know what the policy is at that time.

The inspector may know what the policy is on a given day, but what about the operator? This type of enforcement cannot be fair or constitutional when the operator has but one opportunity to construct the backfill, which in this case was a three year, multi-million dollar undertaking.

OSM's enforcement actions must be judged by whether they are "arbitrary, capricious or otherwise inconsistent with the law", 30 U.S.C. § 1276(a)(1). Putting aside the fact that an operator might be subjected to different standards at different times and places, OSM has approved and enforced a DSMRE rule which is concededly irrational. There is no rationale for the Kentucky 3 foot rule. "An agency rule that is *rational*, based on consideration of relevant factors, and within the scope of the authority delegated to the agency by statute", will not be set aside, *Motor Vehicle Manufacturers Association v. State Farm*, 463 U.S. 29, 42 (1983). Conversely, an irrational rule *should* be set aside, as it is necessarily arbitrary. Where, as here, the agency is acting without the rule making process, its actions should be subject to greater scrutiny and afforded a lesser degree of deference.

III. DUE PROCESS DEMANDS THAT OSM RESPECT RESULTS OF LITIGATION IN AN APPROVED STATE ADMINISTRATIVE REVIEW PROCESS.

In the present case, OSM has re-litigated the same facts, issues and claims which were fully litigated and finally decided in the DSMRE proceeding of 1990. This case makes it plain that OSM believes it must re-litigate every case in which the state agency receives an adverse ruling. The Court should intervene to save OSM from itself, and free the coal industry from such oppressive and overzealous enforcement.

Once a state has been granted primacy under the Act, OSM is not directly involved and should not intervene unless there is an abuse of discretion, *In Re: Permanent Surface Mining Regulatory Litigation*, 653 F.2d 514, 518, 523 (D.C. Cir. 1981). As OSM itself has stated, the oversight rule "must be based on respect for the role of the states". Deficiencies can be corrected at the program level, "without placing the mine operator in the middle of conflicting orders from state and federal officials", 53 FR 26728, 26731 (July 14, 1988), *Preamble to Final Rule, Evaluation of State Responses to Ten-Day Notices*. The agency's discussion of this issue preceding its final rule, *id.*, makes it plain that OSM is not to intervene every time there is a ruling with which it disagrees, yet that seems to be the case. This is unfair to Appolo and the industry. An operator should be able to depend upon a final ruling from the approved state agency as having resolved his liability. Moreover, in spite of Sixth Circuit and IBLA decisions to the contrary, there is no reason that OSM should not be subject to the principals of *res judicata* and collateral estoppel, where the elements for their application are present. The present case is such an instance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES R. GOLDEN
KEITH A. NAGLE
DENHAM, GOLDEN AND NAGLE
P.O. Box 398
Middlesboro, KY 40965
(606) 248-2765

GARY W. NAPIER
Counsel of Record
NAPIER & ASSOCIATES P.S.C.
Suite B, 819 N. Main Street
P.O. Drawer 5087
London, KY 40745-5087
(606) 864-2263

Attorneys for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED, DECIDED AND FILED OCTOBER 24, 2001

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 00-5376

Appolo Fuels, Inc.,

Plaintiff-Appellant,

v.

Bruce Babbitt, Secretary of the United States Department of Interior; Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Kentucky at London.
No. 98-00311 — J. B. Johnson, Magistrate Judge.

Argued: August 3, 2001
Decided and Filed: October 24, 2001

Before: DAUGHTREY and GILMAN, Circuit Judges;
WEBER, District Judge.*

* * *

---

* The Honorable Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.

Appendix A

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. The plaintiff, Appolo Fuels, Inc., appeals the district court's judgment upholding the decision of the Interior Board of Land Appeals that Appolo violated federal regulations requiring the elimination of "highwalls" (described in the record as "cliff-like" rock walls) at its surface coal-mining site in Kentucky. Appolo maintains that it had initially backfilled the site properly and that the subsequent re-exposure of highwalls does not violate the Surface Mining Control and Reclamation Act. Although the Board and the federal courts have consistently held that such re-exposure does violate the Act, Appolo claims that these cases misinterpret the Act, fail to consider modern engineering data, and should be overturned. Second, Appolo claims that the federal action was barred by *res judicata* because the Commonwealth of Kentucky had already decided not to hold Appolo responsible for any alleged violation. Recognizing that the Interior Board of Land Appeals has consistently ruled that the principles of *res judicata* and collateral estoppel do not apply to the Office of Surface Mining, Appolo again urges this court to overturn a line of precedent. Finally, Appolo maintains that the Office of Surface Mining lacked jurisdiction to order the reclamation action. However, as the district court found, the federal statute and regulations, case law, and legislative history indicate that although Kentucky has primary responsibility to enforce mining regulations, the federal agency maintains oversight jurisdiction to enforce those regulations if the state fails to do so. For the reasons set out below, we find no error in the district court's decision sustaining the ruling of the Board, and we therefore affirm.

Appendix A

PROCEDURAL AND FACTUAL BACKGROUND

In September 1984, Appolo Fuels, Inc., received Kentucky surface mining permit # 407-0066 for a large contour surface mining operation of multiple seams of coal. Under this permit, Appolo was required to meet applicable performance standards of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§§§ 1201-1328 (1986). *See* 30 U.S.C. §§ 1265(a) (1986). Among other things, the Act provides that after surface mining, the operator must "backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated. . . ." 30 U.S.C. §§ 1265(b)(3); *see also* Ky. Rev. Stat. Ann. §§ 350.410 (Michie 1997). A highwall is a "face of exposed overburden [material that overlies a coal deposit] and coal in an open cut of a surface mining activity or for entry to underground mining activities." 30 C.F.R. §§ 701.5 (2000). As the Department of Interior's brief describes it,

> [a] surface coal mining operator in a steep, mountainous area removes the part of the mountain lying above the coal seam (known as overburden) before he mines it. The process of removing the overburden to expose the coal creates a highwall, which is a clifflike area [similar to the rock walls seen along interstate highways] extending from the coal seam up. To eliminate the highwall after removing the coal, the operator backfills against the highwall until it is completely eliminated, returning the mined area to its approximate original contour.

Appendix A

Appolo's mining site under permit # 407-0066 was stair-stepped, with two major highwalls of approximately 125 feet each, for a total vertical height of 250 feet. Appolo conducted its mining and reclamation from August 1985 through September 1988. The permit was divided into eight separately bonded increments, which were completed at different times throughout the mining period; increment 1 was completely backfilled, graded, and seeded by November 1986, increments 2 through 5 by November 1987, increment 6 by June 1988, and increments 7 and 8 by September 1988. On March 1, 1989, the Kentucky Department for Surface and Mine Reclamation and Enforcement issued a Phase I (partial) bond release on all eight increments, indicating that "reclamation is complete except for revegetation."

Eugene Boston, chief engineer for Appolo, testified that by the time of Phase I bond release, all highwalls at the permit site had been eliminated. On March 7, 1990, however, inspector Bruce Cowan of the Kentucky Department for Surface and Mine Reclamation and Enforcement issued a non-compliance notice to Appolo. Among other violations, backfilled areas of increments 4 through 8 had settled, exposing highwall up to eight feet high. The notice contained an order to Appolo to eliminate all highwall. Appolo contested the highwall violation, and on August 6, 1991, a Kentucky administrative law judge noted Appolo's original compliance and recommended that no penalty be imposed, nor any remedial action ordered to eliminate the highwall, based on the following reasoning:

> The parties do not dispute the constructions to be given the cited regulations except as applied to

> highwall created by settling. In reviewing 405 KAR 16:190 [backfilling and grading], it is clear that AOC [approximate original contour] must be established during reclamation. However, the regulation does not refer to "maintaining" AOC after it is established. Furthermore, no regulation addresses compaction of backfilled material to prevent settling after AOC is initially established. From a fairness perspective, it would seem logical that the regulation would address commonly occurring settling if it was intended that AOC be established and "maintained" until a final release is obtained.

On September 11, 1991, the Kentucky Natural Resources and Environmental Protection Cabinet followed this recommendation, declining to assess a penalty or to order remedial action against Appolo for the exposed highwall.

In the meantime, during an oversight inspection on August 21, 1990, Earl Dudley Shumante, Jr., a reclamation specialist for the federal Office of Surface Mining, noted the exposed highwall. Shumante did not issue a violation against Appolo at the time, however, because the state was still proceeding with the alleged violation. But after a subsequent bond release inspection on August 4, 1994, Shumante issued Kentucky a ten-day notice that the highwalls at Appolo's site had not been eliminated. On August 10, 1994, the state responded that although this violation had been noted by state inspector Cowen in 1990, Appolo had successfully contested the violation on the grounds that "the wall was eliminated as required which was documented by the Phase I bond release

and that the regulation does not require you to maintain AOC nor do they [sic] address settlement." The federal agency responded that the state's failure to enforce the statutory or regulatory requirements was arbitrary, capricious, or an abuse of discretion, and that the state had not shown good cause for failing to take appropriate action. Kentucky chose not to contest this finding.

After a ground-level inspection, Shumante found exposed highwall ranging from 4 to 15 feet in height. On September 1, 1994, he issued a notice of violation to Appolo for failure to achieve approximate original contour and eliminate highwalls, as required by 405 KAR §§ 16:190 and 30 C.F.R. §§ 816.102. Subsequently, an administrative law judge found that Appolo was in violation of its permit due to the continued existence of the highwalls and upheld the notice of violation. Appolo appealed this decision to the Interior Board of Land Appeals, arguing that it had complied with the regulations by reclaiming the site free of highwalls in time for the Phase I partial bond release and that nothing in the regulations required compaction such that the highwalls would remain eliminated indefinitely. The Board rejected Appolo's contention, holding that:

> Nothing in the State or Federal regulations supports this argument; both authorities require complete elimination of highwalls. *See* 30 C.F.R. §§ 816.102; 405 K.A.R. §§ 16:190. These rules govern backfilling and grading and require complete elimination of all highwalls by those means. In so doing, they implement [Surface Mining Control and Reclamation Act] section

> 515(b)(3), 30 U.S.C. §§ 1265(b)(3) (1994), which requires elimination of "all highwalls." The highwalls at issue were discovered after reclamation of the site during inspections conducted before the sites were finally released from performance bonds insuring completion of required reclamation. Contrary to the suggestion made by Appolo, no loophole exists in the law that will allow an operator to escape compliance with the requirement imposed by State and Federal regulations that highwalls be permanently eliminated.

Appolo Fuels, Inc. v. OSM, 144 IBLA 142, 144 (1998). The Board found the present case indistinguishable from *River Processing, Inc. v. OSM*, 76 IBLA 129 (1983), which addressed the issue of highwall exposure due to settling as follows:

> While the settling of backfill material is not mentioned in 30 CFR 715.14, there is certainly a mandate for an operator to take it into account implied in the language of that section: 'In order to achieve the approximate original contour, the permittee shall * * * transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil material to eliminate all highwalls.' . . . Subparagraph (j)(2) of 30 CFR 715.14 specifies more particularly that '[b]ackfilled materials shall be selectively placed and compacted wherever necessary * * * to ensure the stability of the

> backfilled materials.' It is evident from the record that River Processing failed to place and compact backfilled materials adequately to ensure that the highwall behind Hollow Fill No. 2 would remain completely covered. Thus, while we do not reject the company's assertion that it covered the highwall during its reclamation operations, we do reject its argument that by temporarily covering the highwall it has completely satisfied its obligation 'to eliminate all highwalls.' This Board recognizes that at some time an operator must be relieved of the *responsibility for ensuring that a highwall created during its mining operation remains covered.* However, *this responsibility must continue at least for a sufficient period of time to allow the regulatory authority to determine that the highwall has in fact been covered and that the backfill material has been placed and compacted in a manner that properly takes into account the expected settling.* In our opinion, under the facts of this case, River Processing remained responsible for those highwalls created during its mining and exposed at the time of OSM's November 1980 enforcement action.

Id. at 140-42 (emphasis added; footnotes omitted). Recognizing that some settling of backfilled materials is inevitable, the opinion noted that "[t]he requirement that the permittee eliminate all highwalls completely, as we have construed it, should be able to be satisfied, however, if a permittee places and grades sufficient backfilled material above the level of a highwall to account for reasonably expectable settling." *Id.* at 141 n. 4.

Appendix A

Following the final decision of the Interior Board of Land Appeals, Appolo sought judicial review pursuant to 30 U.S.C. §§ 1276. On February 24, 2000, the district court upheld the Board's decision requiring that Appolo completely eliminate and reclaim highwalls caused by its strip-mining operation. Appolo now appeals that decision.

DISCUSSION

The Surface Mining Control and Reclamation Act provides that "[a]ny action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law." 30 U.S.C. §§ 1276(a). "[T]he findings of the Secretary if supported by substantial evidence on the record considered as a whole, shall be conclusive." 30 U.S.C. §§ 1276(b).

Appolo's first contention on appeal is that, although it was required to "backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated," it was not required to compact the backfill to insure that the highwalls would not be re-exposed due to settling. 30 U.S.C. §§ 1265(b)(3). Appolo maintains that the statute requires compaction to insure stability but that neither this nor any other statute or regulation requires compaction to prevent highwall re-exposure. And, although Appolo recognizes that this argument was rejected in *River Processing*, it nevertheless contends *River Processing* misinterprets the statute and is out-dated in light of new engineering data.

The district court correctly found, however, that Appolo's interpretation of the Surface Mining Control and Reclamation Act is contrary to the statutory provisions requiring the establishment of the approximate original contour and the elimination of highwalls, contrary to clear legislative intent, and unsupported by any precedent. In fact, as the Interior Board of Land Appeals noted, "[i]n order to grant the relief sought by Appolo in this appeal, we should need to overrule more cases than *River Processing:* The opinions in *W.E. Carter [v. OSM*, 116 IBLA 262, 267 (1990)], *Freemont Coal Co. [v. OSM*, 130 IBLA 41, 43 (1994)], *R.C.T. Engineering [Inc. v. OSM*, 121 IBLA 142, 149 (1991)], and *Harlan Cumberland Coal Co. [v. OSM*, 123 IBLA 129, 134 (1992)], . . . would also be called into question . . . ." *Appolo*, 144 IBLA at 146-47; *see also* JA, 33 ("Appolo seeks to overturn, not only its own adverse decision, but also the reasoning of a long line of IBLA opinions, as well as other federal court decisions, on a number of issues."). In sum, Appolo's contention that this court should ignore or overturn precedent falls short of persuading us that the district court's and the Board's opinions were arbitrary, capricious, or otherwise inconsistent with law.

Moreover, we decline Appolo's invitation, issued at oral argument of this case, to decide the precise duration of the obligation to ensure elimination of highwalls under the act. It is sufficient to note that it is neither arbitrary nor capricious for the Office of Surface Mining to require compliance at least until the performance bonds are fully released.

Appolo next contends that it was subjected to an arbitrary and capricious enforcement action because both federal and

state agencies have adopted several different enforcement policies such that Appolo's site would have been evaluated differently depending on the policy in effect when it was evaluated. Our review of the record indicates, however, that of the four policies discussed by Appolo, one was canceled, two were rescinded, and none applied or could have been applied to Appolo's site.

Appolo also maintains that the federal notice of violation should be barred by *res judicata* because Kentucky had already ruled on the alleged violation. The district court correctly recognized, and Appolo itself concedes, that the Interior Board of Land Appeals has consistently ruled that the principles of *res judicata* and collateral estoppel do not apply to the Office of Surface Mining. Again urging this court to overturn a line of precedent, Appolo does not establish that the opinions of the district court and the Board were arbitrary, capricious, or otherwise inconsistent with law.

Finally, Appolo claims that the Office of Surface Mining lacked jurisdiction because it does not have unlimited jurisdiction to pursue violations in primacy states, such as Kentucky.[1] The district court correctly found, however, that although Kentucky had the primary responsibility to enforce mining regulations, the Office of Surface Mining maintains oversight jurisdiction to enforce those regulations if the state fails to do so. An authorized representative of the Secretary is required to conduct a federal inspection whenever there is

---

1. "Primacy states" are states that operate their own, federally-approved, surface mining programs. *See Molinary v. Powell Mt. Coal Co., Inc.*, 125 F.3d 231, 234 (4th Cir. 1997).

reason to believe that a violation of the Surface Mining Control and Reclamation Act has occurred and:

> (B)(1) The authorized representative has notified the state regulatory authority of the possible violation and more than ten days have passed since notification and the State regulatory authority has failed to take appropriate action to cause the violation to be corrected or to show good cause for such failure and to inform the authorized representative of its response. After receiving a response from the State regulatory authority, before inspection, the authorized representative shall determine in writing whether the standards for appropriate action or good cause for such failure have been met . . . .
>
> (2) For purposes of this subchapter, an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered "appropriate action" to cause a violation to be corrected or "good cause" for failure to do so.
>
> . . . . .
>
> (4) Good cause includes: . . . (iv) the State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation,

> where that order is based on the violation not existing . . . .

30 C.F.R. §§ 842.11(b)(1)(i)(B) (2000).

Appolo maintains that Kentucky had good cause for failing to correct the violation given that the state hearing officer assessed no penalty or remedial action against Appolo for the settled highwall because "[f]rom a fairness perspective, it would seem logical that the regulation would address commonly occurring settling if it was intended that [approximate original contour] be established and 'maintained' until a final release is obtained." As an initial matter, the Board noted that, in ruling as a matter of "fairness," the state officer failed to find that there was no violation, as required by (iv), and failed to enforce the state rule requiring highwall elimination. *See Appolo*, 144 IBLA, at 145. Moreover, the Board and the district court correctly found that Appolo lacks standing to challenge the Office of Surface Mining's ten-day notice to the state, which is an "exchange between the Federal and State regulatory authorities." *Id.* at 146; JA, 34.

CONCLUSION

For the reasons set out above, we AFFIRM the judgment of the district court sustaining the decision of the Interior Board of Land Appeals in this case.

APPENDIX B — MEMORANDUM OPINION, ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, LONDON DIVISION DATED AND FILED FEBRUARY 24, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL CASE NO. 98-CV-311

APPOLO FUELS, INC.,

PLAINTIFF

VS.

DEPARTMENT OF INTERIOR, ET AL

DEFENDANTS

MEMORANDUM OPINION, ORDER & JUDGMENT

This matter is before the Court upon the "Petition" (DE#1) by Appolo Fuels, Inc. ("Appolo") to obtain judicial review of the final decision of the Interior Board of Land Appeals ("IBLA") requiring that Appolo completely eliminate and reclaim certain highwalls caused by its strip mining operation (Permit #407-0066) in Kentucky. Upon the parties' mutual consent, the District Judge referred this case to the undersigned Magistrate Judge for final disposition. Oral argument was heard on December 2, 1999. In its

"Answer" (DE#4), the Office of Surface Mining Reclamation and Enforcement ("OSM"), moves this Court to affirm the IBLA decision and dismiss the petition. Appolo has filed a motion for summary judgment, seeking to overturn the decision of the IBLA (DE#19).

The undersigned Magistrate Judge has carefully considered the oral arguments and voluminous written record, including the "Petition" (DE# 1), "Answer" (DE#4), Appolo's "Motion for Summary Judgment" with supporting memorandum (DE#19, 20), the OSM's "Response" (DE#23), and Appolo's "Reply" (DE#26). The main issues before the Court are whether the OSM acted within the scope of its statutory authority, whether the administrative decision was "arbitrary and capricious", and whether the administrative findings are supported by "substantial evidence on the record as a whole". For the following reasons, the decision of the IBLA will be affirmed:

The IBLA decision must not be overturned unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or is unsupported by substantial evidence in the record. 30 U.S.C. § 1276(b); *Ohio v. Ruckleshaus*, 776 F.2d 1333, 1339 (6th Cir. 1985). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-20 (1966); see also, *McCarthney v. Busey*, 954 F.2d 1147 (6th Cir. 1992) (court reviews solely on the administrative record).

In the present case, surface mining by Appolo caused highwalls at the site of Permit #407-0066. As part of its

reclamation obligations under SMCRA that the land be properly restored to "approximate original contour", Appolo covered the highwalls with backfill. TR 192-198. However, the backfill was not compacted and only temporarily covered the highwalls. By March 7, 1990, DSMRE reclamation inspectors observed various problems, including that highwalls[1] had already become exposed by up to eight feet. TR 192-198; TR, Exh. A-19. Other problems included "gullies deeper than nine inches and gullies that are not stable have formed on backfilled slopes", slides affecting non-permit land, failure to maintain adequate vegetative cover to minimize erosion, and inadequate channel protection to prevent erosion. The state cited Appolo for five violations. TR, Exh. A-1, A-14.

"Exposed highwalls" are a violation of 30 U.S.C. §1265(b)(3), which specifically requires operators of a surface mining permit to "backfill, compact (where advisable to insure stability or to prevent leaching of toxic material), and grade in order *to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated.*" SMCRA §515(b)(3) of the Act (italics added); see also, 30 C.F.R. §816.102; 405 K.A.R. §16:190. Appolo acknowledges that it did not compact the backfill at the site and concedes that the highwalls have been exposed at least since 1989. See, e.g., TR 200.

Although the state hearing officer found that the highwalls had already become exposed by eight feet during the past year, he recommended on June 28, 1991 that "no

---

1. See 30 C.F.R. §701.5 for regulatory definition of "highwall".

penalty be assessed and and no remedial action be required". Even though final bond had not yet been released, the hearing officer did not enforce the state and federal requirements of highwall elimination, and the state took no further action to secure abatement of the exposed highwalls.

Prior to final bond release, OSM inspectors conducted a helicopter overflight on August 4, 1994. They observed over a thousand linear feet of exposed highwalls on Appolo's Permit #407-0066, and accordingly, issued a Ten Day Notice (TDN) to the state. After the state indicated it would not take action, the OSM issued a federal Notice of Violation ("NOV") on September 1, 1994. Federal inspectors observed exposed highwalls up to fifteen feet high, and found that the mined area did not conform to the pre-mining approximate original contours of the land and did not blend into or complement the drainage pattern of the surrounding terrain. See *Appolo Inc. v. OSM*, 144 IBLA 142, 143 (1998).

Upon further inspection at the site, federal inspectors also detected fissures, cracks, and at least one feature described as a pressure bulge. The initial NOV was modified to reflect these additional findings, and a Cessation Order was issued on October 1, 1994. Such orders required Appolo to backfill and grade the site to eliminate the exposed highwalls and specified that the backfill used to correct such exposed highwalls must have a long-term static factor of safety of at least 1.3. Appolo was also required to submit "a plan for the stabilization of the area of instability where scarps and pressure bulges have developed in the backfill."

Hearings commenced on April 25, 1995 in Middlesboro, Kentucky. The OSM's witnesses identified exposed

highwalls, fissures, and scarps on Appolo's permit site, and testified about the effect of such features on the long-term stability of the permit. TR 92-94, 209, 219, 226, 242. Appolo's witnesses acknowledged that the exposed highwalls and cracks existed, but testified that they saw no signs of "present mass instability" (such as slides) at location. TR 250-256, 282, 284. The Administrative Law Judge rendered his decision on October 29, 1997, and sustained OSM's issuance of the Notice of Violation (as modified) and the Cessation Order.

Appolo appealed the decision to the Interior Board of Land Appeals ("IBLA"), which affirmed in a written opinion on May 28, 1998. See *Appolo Inc. v. OSM*, 144 IBLA 142 (1998). Appolo then petitioned for judicial review on June 26, 1998, pursuant to 30 U.S.C. § 1276(a)(2). Appolo seeks to overturn, not only its own adverse decision, but also the reasoning of a long line of IBLA opinions, as well as other federal court decisions, on a number of issues.

First, Appolo argues that OSM lacked jurisdiction to impose the federal violations and orders. It is well-settled that "under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so." *Pittsburgh & Midway Coal Mining Co. v. OSM*, 132 IBLA 59, 80-81, fn. 12 (1995); *R.C.T. Engineering, Inc. v. OSM*, 121 IBLA 142 (1991); *Annoco, Inc. v. OSM*, 119 IBLA 158 (1991), *aff'd*, *Annoco, Inc. v. Hodell*, 675 F.Supp 1052, 1056-57 (E.D.Ky. 187).

Appendix B

The legislative history confirms that Congress intended OSM to retain such oversight jurisdiction in primacy states, such as Kentucky. "Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superceded by a Federal permit and enforcement program". S. Rep. No. 128, 95th Congress, 1st Sess. 88 (1977). Congress required OSM oversight "for a number of predictable reasons — including. . . . the tendency for State agencies to be protective of local industry — State enforcement has in the past, often fallen short of the vigor necessary to assure adequate protection of the environment." H.R. Rep. No. 218, 95th Cong., 15th Sess. 129 (1977); DE#23, p. 8.

The Sixth Circuit Court of Appeals observed in *Southern Ohio Coal Co. v. OSM*, 20 F.3d 1418, 1424 (6th Cir. 1994) that "the fact that a mine is located in a primacy state is irrelevant to OSM's duties under section 1271." This enforcement provision, 30 U.S.C. §1271, requires the Secretary, through the OSM, to notify the state whenever there is reason to believe a violation exists. If the state fails "to take appropriate action to cause said violation to be corrected or to show good cause for such failure" and the OSM inspectors observe unabated violations, then the OSM issues a cessation order. See 30 C.F.R. §843.12(a)(2).

To the extent that Appolo challenges OSM's "ten day notice" to the state, the IBLA correctly pointed out that Appolo lacks standing to challenge "this exchange between the Federal and State regulatory authorities." *Appolo*, supra at p. 146, citing 44 Fed. Reg. 14902, 15305 (March 13, 1979);

Appendix B

Fed. Reg. 26728 (July 14, 1988). OSM points out that that permittees lack standing to challenge OSM determinations about "appropriate action" and "good cause". DE#23, p. 10-11.

Regardless, the OSM properly determined that it was not precluded from enforcing SMCRA in the present case. The OSM has considerable agency expertise in interpreting the terms "appropriate action" and "good cause". The IBLA has repeatedly held that when a state agency is prevented from taking the enforcement action necessary to secure the abatement of an alleged violation, the state agency is unable to take "appropriate action" within the meaning of the regulations. See *Thomas J. Fitzgerald*, 88 IBLA 24, 29 (1991); *Pittsburgh & Midway Coal Mining Co. v. OSM*, 132 IBLA 59, 80-81, fn. 12 (1995). Similarly, when a state administrative decision lacks a proper basis in law, it is "arbitrary and capricious, or an abuse of discretion" and cannot provide "good cause" for the state's failure to take appropriate action.

As correctly pointed out in the IBLA appeal decision in the present case:

> "the state's hearing officer *failed to enforce the state rule requiring highwall elimination*. He also *failed to make a finding that there was no remaining violation of the law*, as he was required to do if his decision were to be dispositive of the highwall issue. Because his ruling failed to deal with the question raised by the existence of alleged violations of the Appolo permit, but simply

> excused their admitted presence on the permit, the ruling does not provide good cause to explain the State's failure . . . and cannot operate as a bar to the present enforcement action by OSM." *Appolo v. OSM*, 144 IBLA 142, 145 (1998) (italics added).

The evidence is undisputed that exposed highwalls existed on the mine site after reclamation. See TR, Exh. A-27, photographs. The record is equally clear that, after the initial state citation for exposed highwalls, the state took no action at any time to secure the abatement of such problem. The state hearing decision does not reflect a clear finding of "no violation". Thus, the state hearing officer's decision to excuse the violation lacked a proper basis in law because it was contrary to the plainly-worded statutory requirement that highwalls be eliminated, and was contrary to IBLA precedent and federal court caselaw. Thus, the decision to excuse the violations did not provide good cause for the state's failure to enforce the requirements of SMCRA. The record reflects that the OSM correctly determined that the state agency had *not* enforced the statutory requirement that highwalls be eliminated. See TR 165-190. The OSM's decision to proceed with federal oversight enforcement was not "arbitrary or capricious".

After the federal administrative law judge sustained the federal citations, the IBLA affirmed, holding that "Judge Torbett correctly found, therefore, in his adopted Finding A, that OSM properly exercised Federal oversight authority pursuant to 30 U.S.C. §1271(a)(1) and 30 C.F.R. §843.12 when the NOV and CO were issued to Appolo, because an alleged violation of SMCRA remained to be resolved following state action." The undersigned agrees.

Appendix B

The IBLA also properly rejected Appolo's closely-related argument that federal oversight is barred by "res judicata" or "collateral estoppel". This District Court has previously rejected the very same argument now urged by Appolo and held that the OSM was *not* estopped by the prior decision of the state agency. *See River Processing, Inc. v. OSMRE*, 76 IBLA 129, 90 I.D. 425 (1983), aff'd, *River Processing, Inc. v. Clark*, No. 83-316 (E.D.Ky. May 2, 1985); see also, *Annoco Inc. v. Hodell*, 675 F.Supp 1052, 1056-57 (E.D.Ky. 187). The Sixth Circuit Court of Appeals has also rejected such argument, holding that "collateral estoppel" does not preclude OSM oversight of surface mine operators. See *Horizon Coal Corp. v. United States*, 43 F.3d 234, 240 (6th Cir. 1994).

This is consistent with IBLA precedent. The IBLA has observed that it has "repeatedly held that the doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own notices of violation and/or cessation orders in situations where similar notices and/or orders have been issued and litigated by a state regulatory authority . . ." See *Pittsburgh & Midway Coal Mining Co. v OSM*, 132 IBLA 59, 80-81, fn. 12 (1995); *R.C.T. Engineering, Inc. v. OSM*, 121 IBLA 142, 148 (1991); *Slone v. OSM*, 114 IBLA 353, 356-57 (1990); *W.E.Carter*, 116 IBLA 262, 267 (1991).

Although Appolo cites *Pacificorp v. OSM*, 131 IBLA 17 (1994) in support of its jurisdictional argument, such reliance is misplaced because the state in that case *was* taking corrective action with regard to the violation, and thus, the Board simply found that it was not necessary for OSM to issue a federal citation at that time. See DE#23, p. 13. In the present case, OSM personnel independently verified that

exposed highwalls existed upon the Appolo mine site and that the state had not required abatement of the violation. The IBLA properly found that the issuance of the federal NOV was well within OSM's oversight authority.

To the extent that Appolo argues that the highwall violation should not have been cited in the first place, the record amply demonstrates that the exposed highwalls existed at the time of the state citations prior to bond release and that they were up to fifteen feet in exposed height by the time of the federal citations. See *Appolo Inc. v. OSM*, 144 IBLA 142, 143 (1998); TR 209. Appolo introduced no evidence to the contrary. Rather, Appolo argues that "no violation existed", based upon its own interpretation of SMCRA. In rejecting Appolo's argument, the IBLA plainly stated that "contrary to the suggestion made by Appolo, no loophole exists in the law that will allow an operator to escape compliance with the requirement imposed by State and Federal regulations that highwalls be permanently eliminated". *Id.*, p. 145. Although Appolo urges that its own construction of the regulations be adopted, Appolo has simply not shown that the decision of the IBLA was "arbitrary and capricous" or otherwise not in accordance with law.

Indeed, the IBLA has consistently held that "there is no question that the highwall left by . . . . mining operations constituted an existing violation of section 515(b)(3) of SMCRA . . . where the land had clearly not been restored to its approximate original contour . . . . we have held that the requirement to backfill so as to eliminate all highwalls created by surface coal mining operations and, thus, to restore the land to its approximate original contour is an absolute

requirement . . . we have expressly concluded that a highwall will not be permitted to remain following the conclusion of mining . . ." *Cherry Hill Development v. OSM*, 110 IBLA 185, 1989 IBLA Lexis 61, (August 17, 1989); see also, *Tollage Creek Elkhorn Mining Co.*, 2 IBSMA 341, 87 I.D. 570 (1980), aff'd, *Tollage Creek Elkhorn Mining Co. v. Watt*, No. 80-230 (E.D.Ky. Sept. 1, 1982); *River Processing, Inc. v. OSMRE*, 76 IBLA 129, 90 I.D. 425 (1983), aff'd, *River Processing, Inc. v. Clark*, No. 83-316 (E.D.Ky. May 2, 1985); *St. Charles Mining Co., Inc. v. OSM*, 94 IBLA 183, 192 (1986).

The record shows that, although Appollo initially covered the highwalls with backfill, "exposed highwalls" have been clearly visible at least since 1989, and such violation was cited by state inspectors, but not enforced. Federal inspectors then cited the violation and sought enforcement of SMCRA requirements. All of this occurred prior to final bond release. Of course, the obvious purpose of performance bonds is to ensure the *proper completion of required reclamation*. Thus, Appolo's argument that it had "finished" reclamation by temporarily covering the highwalls with non-compacted backfill and that the highwalls had merely "re-emerged" largely misses the point.[2]

Appollo essentially seeks to overturn the IBLA decision by asking that SMCRA be re-interpreted to mean that the exposed highwalls are not a violation, despite the plain wording of the statute that such exposed highwalls be

---

2. Testimony indicated that Appolo expected settlement, but did nothing to compensate for the expected settling.

completely eliminated for the purpose of achieving approximate original contour. As the OSM aptly points out, the regulations anticipate that approximate original contour will remain restored and that the highwalls will *stay* eliminated, hence the rules requiring stability of backfill and prevention of soil erosion. See 405 K.A.R. 16:001 §1(103); 30 C.F.R. §701.5; 30 C.F.R. §816.22(d)(1)(i); 405 K.A.R. 16:170 §1; 405 K.A.R. 16:050 §4.

Appolo essentially asks this Court to disregard the agency expertise of the OSM in interpreting the implementing regulation of SMCRA and urges that the Court adopt Appolo's interpretation of SMCRA. However, Appolo has not shown that the IBLA decision rests on any improper basis. Furthermore, the interpretation urged by Appolo is contrary to the specific statutory provisions requiring approximate original contour and elimination of highwalls, is contrary to clearly expressed legislative intent, and is unsupported by any IBLA or federal court precedent.

Appolo argues that because "compaction" is not specifically required in order to achieve stability, the surface mine operator/permitee has no responsibility for satisfying the statutory requirement of eliminating exposed highwalls. The IBLA correctly held that such conclusion does not logically follow and is unsupported by any law or case precedent. *Appolo*, supra at p. 145. The IBLA has previously held, as has this Court, that highwalls that quickly reemerge after being temporarily covered are indeed a violation of SMCRA. *River Processing, Inc. v. OSM*, 76 IBLA 129 (1983), *aff'd, River Processing Inc. v. Clark*, No. 83-316 (E.D.Ky.). Other federal courts have dispensed with Appolo's perceived

loophole regarding compaction. In *NWF v. Hodell*, 839 F.2d 694, 734-739 (D.C. Cir. 1988), the D.C. Circuit Court of Appeals held that SMCRA "does not automatically and inevitably require [the Secretary of the Interior] to "flesh out" the prescriptions of sections 515(b)(3) and (b)(16)."

At the federal administrative hearing, Appolo witnesses acknowledged that settlement of backfill can be reduced or controlled by compaction of the soil. See TR 244-45, 268. In fact, the OSM points to evidence in the record showing that, during the permitting process, Appolo represented to the state that "if the the backfill *is properly placed and compacted*, a minimum static safety factor of 1.4 to 1 will be realized." DE#23, p. 45; see also, Appolo Hearing Exhibit A-19, middle of second page, (italics added). Despite this, Appolo did not compact the backfill, and now argues that it should be relieved of its statutory obligation to return the land to "approximate original contour", even though exposed highwalls admittedly existed throughout the Appolo permit site. OSM suggests that Appolo stakes its argument on an erroneous interpretation of legal responsibilities under SMCRA by an Appolo engineer.

OSM points out that the provisions of SMCRA must be read in the context of the entire act, logically and consistently with its overall purpose, and not be "parsed into nonsensical segments". See *National Coal Ass'n v. Uram*, 39 ERC (BNA) 1624 (D.D.C. 1994) (SMCRA needs to be read "as an entire enactment"). SMCRA was "enacted, in part, because some states did not have reclamation requirements as strict as others, thus creating a competitive disadvantage to those states that had strict reclamation requirements." See 53 Fed.

Appendix B

Reg. 26728 (July 14, 1988) at 26731. SMCRA also sets forth in Section 102:

> "It is the purpose of this Act to —
>
> (a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations; . . . .
>
> (d) assure that surface coal mining operations are so conducted as to protect the environment"

OSM points out that a state permit plan could be followed, and yet the permit site may still have SMCRA violations due to a variety of factors such as variation in materials, weather, etc. The fact that a permit plan may have been largely followed does not absolve a surface mine operator of remedying the cited violations. In the present case, Appolo acknowledged that it expected the backfill to expose highwalls, but nonetheless, it did nothing to prevent such anticipated occurrence.

Appolo's argument that exposed highwalls are not a "violation" so long as the existing backfill shows no "present mass instability", but instead has merely "settled", has been advanced before and been rejected by the IBLA and this Court. See *River Processing Inc. v. OSM*, 76 IBLA 129 (1983), *aff'd*, *River Processing Inc. v. Clark*, No. 83-316 (E.D.Ky.). In *River Processing*, as in the present case, the IBLA "Board accepted plaintiff's testimony that the highwall was completely covered initially but that the fill material later settled and exposed portions of the wall." In affirming the IBLA's decision to sustain the NOV, this Court held that "the

highwall exposure was not caused by the mere passage of time under natural conditions after proper reclamation but by failure of the plaintiff to adequately compact the backfill to begin with . . ." *Id.* As in *River Processing*, the issue of the *longevity* of an operator's responsibility for reclamation is not before the Court.

Appolo further argues that the administrative decision is not supported by substantial evidence with respect to the findings of "instability". Appolo alleges that the OSM only identified one area of "true" instability on the site at location "12A". Substantial evidence in the record shows that the existence of cracks and slumps in the fill material. See TR 91-94, 99, 219, 242, 250. A videotape and numerous photographs of the cited features were presented at the federal NOV hearing.

Testimony indicated that the fissures, cracks, and scarps identified in the NOV and CO will allow surface water to enter the fill material, thereby eroding the area and lending to instability, or the future development of instability. TR 81, 92-94. Further testimony indicated that water infiltration was the "main contributing factor" in 50-60% of the approximately 25 slides on Appolo's permit in a fifteen year period and that water infiltration of cracks and fissures could cause future instability. TR 81, 92-94, 147, 294. Appolo witnesses admitted that the fissures and cracks exist, but characterized them as "artifacts of settlement", see TR 250, or as "tension cracks" from the movement of the backfill downward, TR 281-282. However, this characterization does not mean that Appolo can escape its responsibility to properly restore the land, with all highwalls and depressions eliminated.

Appendix B

Although Appolo argues that the cited features are not a violation because "present mass instability" was not visible, see TR 91-94, 99, 250, the OSM pointed out that is not necessary to have a "slide" or "mass slope failure" in order for the cited features to be a violation. The IBLA correctly found that:

> "The statutory definition of AOC [approximate original contour] requires that reclamation restore the mined areas to blend into and complement the drainage pattern, with all such depressions eliminated . . . Appolo did not produce evidence to explain how depressions formed by the scarps and fissures that were admittedly found on backfill in the permit area can blend into or complement the surrounding terrain. It was incumbent on Appolo to make such a showing if this argument were to prevail: See C.F.R. §701.5; 405 K.A.R. § 16:050 §4. Because no proof on the issue was offered, this argument too must be rejected." *Appolo*, supra at 146.

Several expert witnesses testified that they had inspected the permit site and observed the exposed highwalls. TR 88-100, TR 226. Testimony indicated there were "system fissures in the spoil material" which could allow water to enter the fill, leading to possible instability. See TR 92-94. Another DSMRE inspector, who had been assigned to the Appolo site since May 1990, testified that he had also viewed exposed highwalls of up to twelve feet, TR 209, as well as cracks and fissures, both adjacent to the highwalls and downhill from the highwalls. The testimony by these

witnesses, as well as Appolo's witnesses, indicates that cracks can allow surface water to fill and lubricate backfill, thereby leading to possible instability of backfill. TR 92-94, 219, 242, 250, 294. The geotechnical engineer for Appolo's permit viewed some of the exposed highwalls, TR 240-41, and cracks in the backfill and testified that such cracks meant "one side would be settling more than the other side". TR 250, 256. Appolo witnesses acknowledged that the majority of slope failures are the result of water entering cracks, typically through the highwall, TR 242, 254-55, but pointed out that no slope failures were observed.

Testimony by witnesses, both for OSM and Apollo, indicated that compaction could have reduced the settlement in the backfill. TR 244-245. Testimony by Appolo witnesses acknowledged that there were standard engineering methods which could have been employed to reduce settlement, namely, compaction or "overfill", so that the material would settle to the height of the highwall. TR 267-268. The record reflects that neither method was utilized by Appolo and that the reclamation plan did not address the expected settlement.

Essentially, Appolo's theory is that it did not have to consider whether settlement of backfill would leave exposed highwalls, because "in order to achieve stability of a backfill, it is not necessary to utilize compaction" See TR 287-288. However, the notion that the coal company could satisfy its reclamation obligations by "temporarily covering" highwalls is contrary to the specific requirements and overall purposes of SMCRA, contrary to OSM interpretation, and contrary to IBLA and federal court precedent. Appolo confuses the technical requirements of mass stability with the broader

requirement of elimination of exposed highwalls. By insisting that the OSM has shown instability in only one area, and by concluding that this relieves Appolo of its responsibility to reclaim the permit site so as to eliminate exposed highwalls throughout the site, Appolo has incorrectly framed the issue. See E#26, p. 6-8, DE#20, p. 31. A careful reading of the citation itself shows that federal inspectors cited Appolo for exposed highwalls, and upon further inspection, additionally cited particular areas of "instability" as evidenced by cracks and fissures. Very simply, SMCRA requires Appolo to return the land to approximate original contour and to eliminate all highwalls. The fact that the regulations require that the backfill used to restore the land must also be "stable", with or without compaction, lends support to the OSM's interpretation of SMCRA.

Finally, Appolo asserts that the state agency has adopted an informal enforcement policy that settlement of up to three feet will not trigger state enforcement of the highwall elimination law. Apollo asserts that over the years, OSM has had several different enforcement policies and that alleged disparity with the informal state policy essentially amounts to a due process violation. While consistent enforcement is certainly desirable, the IBLA correctly found that substantial evidence at the federal administrative hearing indicated that the highwalls measured up to fifteen feet feet at the time of the federal inspections, see *Appolo*, supra at 143, and thus, exceeded both the state and federal enforcement policies, see *Appolo*, supra at 146. The present case involves a permanent permit, rather than an interim permit, and thus, Appolo was never eligible for any "interim permit policies", including the "FN 3 policy". See Exhibit R-28. Additionally,

the "REG-30" policy to which Appolo refers only applied to mine operators who had "planned for [expected settlement]" and "accommodated [for settlement] in the plan for backfilling and regrading". Exhibit A-6, pp. 1-2, "Policy". Appolo has acknowledged in the record that it did nothing to plan for expected settlement in the backfill adjacent to the highwalls. TR 252, 267.

After careful consideration of the record, the undersigned concludes that the IBLA decision was based upon a consideration of all relevant factors, a reasonable and permissible construction of the relevant statutes, and was supported by substantial evidence. The Board's decision was not "arbitrary or capricious" and was in accordance with law. Accordingly,

It is **ORDERED** and **ADJUDGED** that, upon consideration of "Petition for Judicial Review" (DE# 1), the IBLA decision is **AFFIRMED**,

It is further **ORDERED** that the "Motion for Summary Judgment" (DE# 19) by Appolo Fuels, Inc. is **DENIED**, with plaintiff to pay the costs of this action.

IT IS SO ORDERED.

This the 24th day of February, 2000.

s/ J.B. Johnson, Jr.
J.B. JOHNSON, JR.
UNITED STATES MAGISTRATE JUDGE

APPENDIX C — OPINION OF THE UNITED STATES DEPARTMENT OF THE INTERIOR DATED AND DECIDED MAY 28, 1998

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

APPOLO FUELS, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 98-62 Decided May 28, 1998

Appeal from a Decision of Administrative Law Judge David L. Torbett sustaining Notice of Violation No. 94-081-416-003 and Cessation Order No. 94-081-416-002.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination

   An NOV and CO issued by OSM in the exercise of Federal oversight authority were properly affirmed based on findings that settlement of backfill inside the permit area

of a Kentucky surface coal mining operation resulted in highwalls, scarps, and fissures in violation of State law and contrary to SMCRA section 515.

* * *

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Appolo Fuels, Inc. (Appolo) has appealed from an October 29, 1997, Decision of Administrative Law Judge David L. Torbett that sustained issuance of Notice of Violation (NOV) No. 94-081-416-003 and Cessation Order (CO) No. 94-081-416-002, as amended, to Appolo by the Office of Surface Mining Reclamation and Enforcement (OSM). The NOV alleging that Appolo failed to return Permit No. 407-0066 to approximate original contour (AOC) and eliminate all highwalls, as required by State and Federal regulations implementing section 515 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), was issued on September 1, 1994; the CO, issued on October 1, 1994, required Appolo to backfill and grade the permit to eliminate exposed highwalls. As later amended, the NOV requires submission within 30 days of "a plan for the stabilization of the areas of instability where scarps and pressure bulges have developed in the backfill." Any plan proposed must include "elimination of all exposed highwall with a resulting backfill whose long-term static factor of safety is at least 1.3." Appolo sought temporary relief from the CO and a hearing, following which the Decision now before us was issued sustaining the amended NOV and CO. A timely appeal was taken from Judge Torbett's Decision sustaining the NOV and CO; we affirm his Decision.

Appendix C

Testimony given at the hearing before Judge Torbett held on April 25, 1995, established that highwalls up to 15 feet in height, scarps, and fissures remained on the Appolo permit after reclamation of the site. (SOR at 42; Tr. at 41-60, 91-97, 99-103, 250); Adopted Finding LL, Judge Torbett's Decision. "Scarps" were defined variously by witnesses at the hearing, but it was agreed the term describes abrupt changes in slope. *See, e.g.*, Tr. 240. Witnesses for OSM and Appolo disagreed about how those features should be characterized, OSM's employees choosing to describe them as indicators of long term instability in the fill when watered (Tr. 81, 92-94, 147), while Appolo witnesses saw them as artifacts of stress induced by settling of the fill; the latter view was supported by reference to the fact that there had as yet been no landslides in the filled areas. (Tr. 201-202, 219, 241, 276.)

Appolo raises a principal contention on appeal that OSM issued the NOV in error because highwalls left on the permit were properly reclaimed but reappeared after the covering fill settled. Pursuing this theory it is alleged that there is no regulatory requirement that the permit be maintained free of highwalls, once they are all eliminated. Recognizing that this argument runs counter to the holding in *River Processing, Inc. v. OSM*, 76 IBLA 129 (1983), Appolo urges the cited case was decided in error and should be overruled. In a number of subsidiary arguments, it is said that OSM lacked authority to issue the NOV, that OSM's issuance of the NOV is barred by the doctrine of *res judicata*, and that evidence at hearing concerning stability of the backfill indicates the NOV should not have been issued by OSM, because SMCRA only requires compaction of fill to insure stability, and does not require compaction "to reduce settlement of backfill

material." (SOR at 36.) Finally, it is suggested that Judge Torbett's opinion may have been coerced, inasmuch as, at the conclusion of the hearing before him, he "indicated he agreed with Appolo's position" and was then "reassigned, and stripped of his law clerk staff," whereupon he issued a Decision that "simply cited OSM's brief." (SOR at 2.)

Judge Torbett's Decision does, as Appolo says, find for OSM by adopting attached OSM briefs, which include proposed findings and conclusions, "as the final opinion." (Decision at 2.) It is, nonetheless, clear that Judge Torbett rejected Appolo's arguments in so doing, and adopted the findings proposed by OSM concerning the contested NOV and CO. There is nothing in this method of decisionmaking, of itself, that indicates bias or error.

A discussion between counsel and the Judge following completion of testimony considered whether settlement of fill after reclamation can violate SMCRA's prohibition against highwalls. It is apparently this exchange that Appolo considers to be his statement of agreement with the Appolo position. The reported discussion includes the observation by Judge Torbett concerning whether highwall elimination must be permanent, "that's the issue I want you to brief because that's the issue that's going to have to be resolved. Regardless of how I decide this case, I feel like it will be resolved." (Tr. at 300.) Other statements concerning his probable future ruling are similarly inconclusive about his intended result, including his recollection that this case is the first of its kind that he has tried (Tr. at 299), and a comment that he may "differ" with both counsel but will apply applicable State and Federal regulations to reach a

decision. (Tr. at 301-302.) Neither the nature of the Decision issued by Judge Torbett nor his comments at the close of the evidence indicate that he was improperly motivated by considerations of a personal nature when he ruled as he did, and the suggestion there was improper conduct on the part of the fact finder must be rejected as unsupported in the record.

While this case may have been one of first impression for Judge Torbett, it is not without precedent in the Department, as Appolo acknowledges. The question whether a permittee has satisfied reclamation obligations under SMCRA by temporarily covering a highwall was directly answered in *River Processing, Inc. v. OSM*, 76 IBLA 129, 141 (1983), when the Board refused to accept the very argument now advanced by Appolo, stating "[w]hile we do not reject the company's assertion that it covered the highwall during its reclamation operations, we do reject its argument that by temporarily covering the highwall it has completely satisfied its obligation 'to eliminate all highwalls.' " On the record before us, this case cannot be distinguished from *River Processing*; Appolo is correct in asserting that, if this appeal is to succeed, then *River Processing* must be overruled. We decline to do so, however, and instead affirm Judge Torbett's Decision.

Appolo suggests the *River Processing* opinion rests on "faulty engineering data and an incorrect interpretation of [SMCRA]." (SOR at 35.) It is said that the "error of the *River Processing* case is in its assumption that settling of backfilled materials is equivalent to 'instability.' " (SOR at 36.) Arguing that SMCRA requires only so much compaction of filled areas

as is needed to insure stability, Appolo concludes that, inasmuch as SMCRA does not require compaction to prevent highwalls, there is no requirement to maintain reclaimed areas free of highwalls resulting from settling backfill.

This argument was first advanced at the hearing by Appolo's chief engineer, who testified that the areas where highwalls had emerged after reclamation were nonetheless properly reclaimed because, while there had been settling of fill material, the fill was not unstable. (Tr. 286-89.) According to Appolo's engineer, stability of the fill was shown by the fact that, while it had settled, none of the backfilled areas exhibited structural deformation indicating the fill was likely to slide. (Tr. 279-83.) He reasoned that because Appolo had complied with the reclamation regulations by eliminating the highwalls, "[w]e have complied with our permit, and should not be punished for * * * what's not in the regulations." (Tr. 289.)

Nothing in the State or Federal regulations supports this argument; both authorities require complete elimination of highwalls. *See* 30 C.F.R. § 816.102; 405 K.A.R. § 16:190. These rules govern backfilling and grading and require complete elimination of all highwalls by those means. In so doing, they implement SMCRA section 515 (b)(3), 30 U.S.C. § 1265(b)(3) (1994), which requires elimination of "all highwalls." The highwalls at issue were discovered after reclamation of the site during inspections conducted before the sites were finally released from performance bonds insuring completion of required reclamation. Contrary to the suggestion made by Appolo, no loophole exists in the law that will allow an operator to escape compliance with the

requirement imposed by State and Federal regulations that highwalls be permanently eliminated. Judge Torbett correctly sustained the NOV and CO, based on his adopted Findings B through F and GG, that Appolo had failed to restore the permit to AOC by removing all highwalls. *See River Processing*, *supra*, and authorities cited therein. Rejection of this principal argument on appeal does not entirely decide this appeal; the additional objections to Judge Torbett's ruling have been often considered in past opinions, however, and do not merit extended discussion.

As defined by statute and regulation, AOC means restoration of "the general surface configuration of the land prior to mining [that] blends into and compliments the drainage pattern of the surrounding terrain, with all highwalls * * * eliminated." 30 C.F.R. § 701.5, implementing 30 U.S.C. § 1265(b)(3) (1994). Appolo now argues that OSM was prevented from issuing an NOV to Appolo by state administrative proceedings that ended in 1991 with a finding that Appolo was not required, as a matter of fairness, to eliminate highwalls and return the permitted area to AOC where surface conditions were the result of backfill settlement occurring after highwalls had been eliminated. By ruling as he did, however, the State's hearing officer failed to enforce the state rule requiring highwall elimination. He also failed to make a finding that there was no remaining violation of the law, as he was required to do if his decision were to be dispositive of the highwall issue. Because his ruling failed to deal with the question raised by the existence of alleged violations on the Appolo permit, but simply excused their admitted presence on the permit, the ruling does not provide good cause to explain the State's failure to cite the violation

and cannot operate as a bar to the present enforcement action by OSM. *W.E. Carter*, 116 IBLA 262, 267 (1990). Contrary to an underlying assumption in this argument, OSM has authority, in an oversight capacity in such cases as this, to issue an NOV in Kentucky, notwithstanding that primary regulatory jurisdiction rests with the State, in order to insure that SMCRA standards are properly enforced. *Annaco, Inc. v. Hodel*, 675 F. Supp. 1052, 1056 (E.D. Ky. 1987).

Further, if the doctrine of *res judicata* were to be applied in this case, as Appolo contends, there must be evidence to support a finding of privity between OSM and the state regulatory agency in the permitting and administrative process at the state level. See *Annaco, Inc.*, *supra*, at 1059. No such evidence is present here, and this argument is rejected. *Freemont Coal Co. v. OSM*, 130 IBLA 41, 43 (1994). Principles of *res judicata* do not apply to OSM's enforcement of SMCRA in cases such as this, where a SMCRA violation remains unresolved by state administrative action. See *R.C.T. Engineering, Inc. v. OSM*, 121 IBLA 142, 149 (1991). Judge Torbett correctly found, therefore, in his adopted Finding A, that OSM properly exercised Federal oversight authority pursuant to 30 U.S.C. § 1271(a)(1) and 30 C.F.R. § 843.12 when the NOV and CO were issued to Appolo, because an alleged violation of SMCRA remained to be resolved following State action.

The argument by Appolo that backfill instability was not proven by OSM (and that the NOV should therefore be dismissed) overlooks evidence provided by both OSM and Appolo that scarps and fissures are present in backfill on the permit. Testimony at the hearing established that because such

features invite erosion damage by permitting water to enter the fill, their existence indicates an instability in the fill. *See* Tr. 81, 92-94, 147, 294. The statutory definition of AOC requires that reclamation restore the mined area to blend into and complement the drainage pattern, with all such depressions eliminated. 30 U.S.C. § 1265(b)(3) (1994). Appolo did not produce evidence to explain how depressions formed by the scarps and fissures that were admittedly found on backfill in the permit area can blend into and complement the surrounding terrain. It was incumbent on Appolo to make such a showing if this argument were to prevail. *See* 30 C.F.R. § 701.5; 405 K.A.R. § 16:050 § 4. Because no proof on the issue was offered, this argument too must be rejected.

Arguments advanced by Appolo concerning rules applicable to interim surface mining permits can have no relevance to this case, which did not involve such a permit. And while Appolo alleges OSM acted improperly in rejecting a State response to a notice from OSM of possible violations on the Appolo permit (10-day notice), including highwalls and scarps left on the Appolo permit, a permittee-operator lacks standing to challenge the conduct of this exchange between the Federal and State regulatory authorities. *See* 44 Fed. Reg. 14902, 15305 (Mar. 13, 1979); 53 Fed. Reg. 26728, 26742 (July 14, 1988); *Harlan Cumberland Coal Co. v. OSM*, 123 IBLA 129, 134 (1992). Arguments addressed to alleged deficiencies in the 10-day notices given by OSM to the State must therefore be rejected as well. Finally, a suggestion that the state regulatory authority may adopt backfill policies allowing tolerance of small amounts of settlement is misplaced in this case where backfill settlement exposed 15-foot highwalls, a variance exceeding the minimal allowances described by Appolo.

Appendix C

In order to grant the relief sought by Appolo in this appeal, we should need to overrule more cases than *River Processing*: The opinions in *W.E. Carter*, *Freemont Coal Co.*, *R.C.T. Engineering*, and *Harlan Cumberland Coal Co.*, *supra*, would also be called into question were we to take favorable action on Appolo's appeal, given the circumstances shown to exist on the Appolo permit. We therefore find that Appolo has failed to show error in the Decision here under review and affirm Judge Torbett's Decision, which is consistent with our prior opinions. Any arguments raised by the parties not specifically addressed in this opinion have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

s/ Franklin D. Arness
Franklin D. Arness
Administrative Judge

I concur:

s/ Gail M. Frazier
Gail M. Frazier
Administrative Judge

APPENDIX D — RELEVANT STATUTE AND LEGISLATIVE MATERIAL

30 U.S.C. § 1265(b)(3)

§ 1265. Environmental protection performance standards

* * *

(b) General standards. General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to —

* * *

(3) except as provided in subsection (c) of this section with respect to all surface coal mining operations backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated . . .

* * *

H.R. Rep. 95-918, 1977 U.S.C.C.A.N. 593

MOUNTAINTOP MINING

Although usually preferable, it may not always be best to return mountain lands to their approximate original contour. In various areas such as the mountainous

Appendix D

Appalachian coalfields, there is a paucity of flood free, relatively flat developable land. Thus some surface mining operations offer the opportunity for creating a resource which otherwise might not be available or might be prohibitively expensive.

The mining application process and environmental standards allow the regrading and spoil placement requirements for mountaintop commercial, agricultural, residential, or public facility (including recreational facilities) development. The bill provides that such proposed uses of land must be reasonable and capable of being met with respect to public and private investments if any are required. It is expected that fill areas created for such development are to be designed and constructed in lifts so that the land is capable of development upon completion of mining. It is intended that the Secretary of Interior will include in regulations to be issued under the act such fill placement standards as are necessary to assure suitable site development for its intended use upon completion of mining and the initial guidelines are provided in section 515(b)(11). Standards should parallel those used by the Department of Housing and Urban Development or the Federal Highway Administration for developing fill areas for construction purposes.

The committee felt that these planning and fill placement requirements were reasonable since:

(1) The utility of a flat landsite on a mountaintop for developed uses is dependent upon suitable access, adequate utilities, such as water, storm water and sewage control. Without indication that public jurisdictions involved will

assume responsibility for maintaining the necessary public facilities, the development of flat areas should not be encouraged.

(2) Controlled placement and compaction of spoil is desirable so that surface created is suitable for use without waiting for settling prior to the immediate development if anticipated.

* * * *